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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID JESSEN, Plaintiff and Appellant, v. MENTOR CORPORATION, Defendant and Respondent.	B210059 (Los Angeles County Super. Ct. No. SC083187)

APPEAL from an order of the Superior Court of Los Angeles County, John H. Reid, Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis for Plaintiff and Appellant.

Kalland & Romag and James J. Romag for Defendant and Respondent.

David Jessen appeals from a postjudgment order awarding Mentor Corporation $11,617.88 in costs as the prevailing party in Jessen's product liability action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Jessen sued Mentor, a medical device manufacturer, for strict liability, negligence and breach of warranty, alleging Mentor had failed to provide adequate warnings on the outer packaging of its testicular prosthesis. The trial court granted Mentor's motion for summary judgment on the ground Jessen's state law claims were preempted by federal law. We affirmed in a published opinion. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480.)

Following the trial court's entry of judgment, Mentor filed a memorandum of costs seeking to recover $13,906.80 as the prevailing party in the action. Jessen moved to strike and/or tax costs, arguing all the expenses incurred by James Romag, Mentor's Illinois-based counsel who had been admitted *pro hac vice* in this matter, to travel to depositions in California were improper because Mentor had local counsel who could have attended the depositions and Romag, in any event, became a member of the California bar and established a practice in this state during the pendency of the case. Jessen also argued other costs Mentor sought to recover—filing and motion fees, deposition transcription fees, service of process fees and the cost to photocopy his medical records—were either unnecessary or excessive.

As part of Mentor's opposition to the motion, Romag filed a declaration explaining why he had attended the depositions. Romag stated he had developed expertise with respect to Mentor's medical devices, which are used globally, and was lead counsel in this case, as he had been in a number of other cases in California and nationally. Romag customarily associated local counsel solely for the limited purposes of handling filings, making court-mandated appearances and ensuring pleadings conform to local rules. Romag also attached to his declaration invoices supporting the costs Mentor was seeking.

In his reply brief Jessen argued Romag failed to establish he was the custodian of records for Mentor or had personal knowledge of the invoices submitted and failed to

lay a proper foundation for the admission of the documents. Jessen also argued for the first time that specific items incurred by Romag were unreasonable or unnecessary. For example, Jessen asserted the cost of a limousine to and from the Chicago airport was unreasonable because Romag failed to demonstrate it was less expensive than a taxicab; he also contended Mentor should not be permitted to recover costs to travel to a deposition that had been canceled.

The trial court initially denied Jessen's motion to strike or tax costs because the parties and the court had previously agreed to stay all proceedings (which included trial of Jessen's claims against Mentor's former codefendant, S&B Surgery Center) pending resolution of the preemption issue then before this court on appeal. Following our affirmance of the judgment in favor of Mentor (*Jessen v. Mentor Corp.*, *supra*, 158 Cal.App.4th 1480), Jessen again moved to tax costs.

In its opposition to Jessen's motion Mentor, in "an effort to simplify the issues relative to [Jessen's] motion," withdrew its request for recovery of certain costs, reducing the total it sought to $12,676.71. With its opposition Mentor filed another declaration from Romag, responding to certain arguments Jessen had raised for the first time in his initial reply brief. For example, Romag explained limousine service to Chicago's airports, 42 and 53 miles from his residence, costs less than a taxicab. Jessen filed a reply memorandum, which largely mirrored his initial reply brief.

After extensive argument by the parties at a hearing on July 23, 2008, the trial court continued the matter to allow Mentor to file a supplemental declaration from Romag to address issues raised by Jessen in his reply brief that Romag had failed to address earlier, as well as issues raised during argument, including whether the invoices attached to Romag's declaration had been properly authenticated and whether Mentor was seeking reimbursement for Romag's personal expenses. (For example, Jessen had claimed the mileage on Romag's California rental cars was so substantial that Romag must have been driving them for personal reasons.) The court permitted Jessen to file a supplemental declaration in opposition to Romag's.

Mentor filed Romag's supplemental declaration. Jessen filed a reply brief arguing the supplemental declaration still failed to demonstrate the costs Mentor had incurred were reasonable or necessary or supported by competent evidence. After a further hearing on August 13, 2008 the court awarded $11,617.88 in costs to Mentor, reducing the sum Mentor had initially sought by the amount it had voluntarily withdrawn and striking $1,008.84 in costs for the photocopying of Jessen's medical records. With respect to Romag's travel expenses, the court found, "Romag's supplemental declaration justifies the claimed charges and shows that he has personal knowledge of the bills provided. Moreover, the concern that Mr. Romag improperly seeks reimbursement for personal expenses is unfounded. He has provided a very detailed explanation of the charges claimed, along with sufficient backup documentation."

DISCUSSION

As the prevailing party in Jessen's product liability lawsuit, Mentor was statutorily entitled to an award of costs. (Code Civ. Proc., § 1032, subd. (b).)[1] Section 1033.5, subdivision (a), expressly identifies certain items allowable as costs under section 1032. Section 1033.5, subdivision (b), specifies certain items that are not allowable as costs, "except when expressly authorized by law." If a specific cost item is not identified in either section 1033.5, subdivision (a), or subdivision (b), "it may be awarded in the trial court's discretion under section 1033.5, subdivision (c)(4), provided it satisfies the further requirement of section 1033.5, subdivision (c)(2), that it was reasonably necessary to the conduct of the litigation." (*Seever v. Copley Press, Inc*. (2006) 141 Cal.App.4th 1550, 1558.)

If the items in a cost bill are authorized by section 1033.5, subdivision (a), the burden is on the party seeking to tax costs to show the costs incurred were not reasonable or necessary. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) We review the trial court's determination whether a cost item was reasonably necessary

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1 Statutory references are to the Code of Civil Procedure.

to the litigation for abuse of discretion. (*Ibid*.; *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39.)

Section 1033.5, subdivision (a)(3), expressly allows as costs "travel expenses to attend depositions." The statutory language contains no limitation regarding the nature or extent of the travel, provided only that the costs must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" (§ 1033.5, subd. (c)(2)) and "shall be reasonable in amount" (§ 1033.5, subd. (c)(3)). Nonetheless, Jessen contends the trial court abused its discretion in permitting Mentor to recover $6,540.35 for Romag's travel expenses incurred in connection with six trips to attend 15 depositions because Mentor could have had its Los Angeles-based counsel attend the depositions or have had Romag participate telephonically.[2] This court, as well as our colleagues in Division One of the Fourth Appellate District, among others, have expressly rejected a similar per se rule limiting reimbursement for deposition travel expenses to local travel. (See *Seever v. Copley Press, Inc., supra*, 141 Cal.App.4th at p. 1560 [affirming mileage reimbursement for travel by San Diego-based lawyer to Los Angeles for depositions]; *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548 [affirming reimbursement for costs incurred by Bakersfield attorneys to attend

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2 Without citation to relevant authority, Jessen contends the trial court abused its discretion when it allowed Romag to file a supplemental declaration addressing arguments first advanced by Jessen in his reply brief or during argument at the July 23, 2008 hearing. A trial court has the inherent authority to control litigation before it to ensure the orderly administration of justice. "'It is . . . well established that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citation.] . . . ". . . That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice."'" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351; accord, *Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953, 867; see §§ 128, 177.) The trial court's short continuance in this case of a matter that had been pending at the parties' request for more than two years to permit the filing of a supplemental declaration that would lead to a more informed decision, with an opportunity for Jessen to respond to that supplemental declaration, falls well within the trial court's broad discretion to ensure the orderly and efficient administration of justice.

depositions in San Diego County, including charter air travel from Bakersfield to San Diego, hotel bills incurred in San Diego and rental car costs].) "Determination of whether a cost is reasonable is within the trial court's discretion. [Citation.] Plaintiffs ask us to read into the statute a provision it does not contain, i.e., limitation of travel expenses incurred in taking a deposition to local travel. We may not construe a statute to add a restriction it does not contain. [Citation.] Section 1033.5, subdivision (a)(3) does not limit reimbursement for deposition travel to travel by attorneys practicing in the court's jurisdiction." (*Thon*, at p. 1548.) There is no more reason to restrict a prevailing party's recovery of deposition travel costs simply because the lawyer crosses state borders to attend a deposition than there is when he or she travels from Northern or Central California to Los Angeles. In either case the touchstone is whether the costs sought are necessary and reasonable. (§ 1033.5, subd. (c)(2) & (3).)

Similarly lacking merit are Jessen's other arguments challenging the reasonableness of Romag's travel expenses, such as the propriety of tipping the limousine driver $15. The trial court examined the evidence, including three declarations from Romag refuting each of Jessen's specific arguments, and determined the costs it awarded were necessary and reasonable. Jessen presents nothing to suggest the trial court abused its discretion in reaching that conclusion and awarding Mentor travel expenses incurred by Romag to attend depositions.

DISPOSITION

The order is affirmed. Mentor is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J. ZELON, J.